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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-10

CHARLES O. FINLEY & CO., INC., an Illinois corporation,
Petitioner,

vs.

BOWIE K. KUHN, Commissioner of Baseball, *et al.*,
Respondent.

Petitioner's Reply to Opposition to Petition for a Writ of Certiorari.

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SUBJECT INDEX

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I
Introduction.

In the instant case Organized Baseball, by its Commissioner, seeks not only the maintenance of "a derelict in the stream of law," but the expansion of that derelict to exempt forever from antitrust jurisdiction the entire stream of commerce that constitutes this "big business that is packaged with beer, with broadcasting, and with other industries." *Flood v. Kuhn*, 407 U.S. 258, 286 (1972). According to Respondent, Baseball's exemption cloaks all of today's extensive baseball business, not just its reserve system or its historically essential sports practices. However, Congress has specifically refuted this very position by rejecting bills which would have granted "professional baseball . . . a complete immunity from the antitrust laws."

H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230 (1952).

Concurrently, Organized Baseball exhorts this Court not to disturb the aspect of the appellate court's judgment upholding baseball's blanket waiver of recourse to the courts, which would perpetually preclude every federal court from exercising diversity or federal question jurisdiction, both of which were invoked at bar, over any decision rendered by the Commissioner of Baseball. Baseball bases this exhortation on the patently specious theory that the waiver issue does not involve a question of federal law.

If this Court is willing to acquiesce in Organized Baseball's stealthy expansion of "the *reserve system's exemption*" from the antitrust laws, *Id.* at 281, and in the enforcement of Baseball's blanket waiver of recourse to the courts, the result will be an absolute, unfettered monopoly over this multi-billion dollar business—one unbridled by any source of competition, free to extend that monopoly by unreasonable restraints of trade to its numerous interrelated industries, and completely immune from any judicial recourse by its victims. In fact, the instant judgment, if not reversed, would stand for the proposition that Organized Baseball's hierarchy may intentionally conspire to fix the price of player talent at an artificially low level, engage in a group boycott designed to bankrupt one of its non-parallelling members, and then preclude the federal courts from entertaining the victim's suit, whether it be based on antitrust or other theories. Petitioner submits that the case and statutory law unequivocally refute the Court of Appeals judgment, and respectfully urges this Court to review and reverse, not sanction, such a disastrous and unjust precedent.

II

Only Baseball's Reserve System, Not Its Entire Business, Is Exempt From the Antitrust Laws.

Organized Baseball's erroneous claim that its entire business is exempt from the antitrust laws is based upon a misreading of *Federal Baseball, Toolson* and especially *Flood,* and a total disregard of the reasons on which this Court based its exemption of baseball's *reserve system.* Each of the violations of the antitrust laws alleged by the plaintiffs in *Federal Baseball, Toolson* and *Flood* involved only the enforcement of baseball's *reserve system.* Further, while Congress has endorsed protection for the reserve system, it has fully reviewed and repeatedly rejected bills which would have exempted the entire business of baseball from the antitrust laws. H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230-1 (1952); H.R. Rep. No. 94-1786, 94th Cong., 2d Sess., p. 38 (1977). The granting of exemptions from the antitrust laws "is a matter within the discretion of Congress." *Toolson v. New York Yankees,* 346 U.S. 356, 364 (1953). Consequently, this Court's acquiescence in Organized Baseball's demand for blanket immunity for its entire business from the antitrust laws, after Congress rejected that precise request, would not only frustrate Congressional intent but also violate the separation of powers doctrine. For these reasons Petitioner submits that this Court should grant the instant Petition, reiterate what it held in *Flood v. Kuhn, supra,* —that only baseball's reserve system, not its entire business, is exempt from

the antitrust laws[1]—and reverse the judgment of the appellate court.

Respondent's contention that the plaintiff in *Federal Baseball* alleged that the refusal of defendant leagues to permit plaintiff to play games against the leagues' teams violated the antitrust laws (Opposition, p. 9) is incorrect. The plaintiff's allegations were set out in full in *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore,* 269 Fed. 681, 683-4 (D.C. Cir. 1921), and state that by the enforcement of the "reserve clause" the National and American Leagues gained control over practically all available skilled players and thereby denied the Federal League of the ability to produce exhibitions of baseball. *Id.*

Similarly, while the three plaintiffs in *Toolson* alleged that organized baseball was a monopoly, each alleged that he had "been *damaged by enforcement* of the standard '*reserve clause*' " and "because of illegal and inequitable agreements . . . binding each (league) to respect the other's '*reserve clauses*'." *Toolson v. New York Yankees, supra* at 346 U.S. 356, 362-4. (Emphasis and parentheses added.)

Finally, this Court in *Flood v. Kuhn, supra,* made it clear that in *Federal Baseball, Toolson* and *Flood* ("for the third time in 50 years") it had been "asked specifically to rule that professional baseball's *reserve system* is within the reach of the antitrust laws." *Id.* at 259. (Emphasis added.) The Court's ultimate holding was that "with its *reserve system* enjoying exemption from the antitrust laws, baseball is . . . an exception and an anomaly." *Id.* at 282. (Emphasis added.)

[1]This is not to say that Petitioner opposes a reversal of *Flood's* exemption of the reserve system. Petitioner's position is simply that under the *current state of the law* only the reserve system is exempt, its action does not challenge the reserve system, and therefore the judgment dismissing the action must be reversed.

The reasons the *Flood* Court cited for exempting the reserve system underscore the exception's limits. The Court recognized that Organized Baseball had detrimentally relied on *Federal Baseball* during the thirty years prior to *Toolson,* but concluded that such reliance extended only to the violation alleged in *Federal Baseball*—the reserve system. *Id.* at 274. Detrimental reliance obviously cannot excuse the alleged violation at bar—an intentional conspiracy designed to fix the price of player talent and to drive Petitioner out of the business of baseball.

Most importantly, the standard of Congressional inaction cannot justify the exemption of the entire business of baseball from the antitrust laws. Congress did endorse the reserve system, *Id.* at 407 U.S. 272-3, and it did fail to overrule *Federal Baseball* and *Toolson,* which dismissed actions challenging the reserve system. These facts led this Court to conclude correctly "that Congress has as yet no intention to subject baseball's *reserve system* to the reach of the antitrust statutes." *Id.* at 283. (Emphasis added.) However, Congress has acted on the very demand Organized Baseball now makes—that its *entire business* be exempted from the antitrust laws. Congress specifically rejected bills providing that "professional baseball be granted a complete immunity from the antitrust laws" in 1952 (H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230) and reaffirmed this aspect of its 1952 report in 1977. H.R. Rep. No. 94-1786, 94th Cong., 2d Sess., p. 38. Thus, Respondent's contention that "Congressional action . . . confirms that the business of baseball as a whole is

exempt from the antitrust laws," (Opposition, p. 11), is utterly false. Indeed, Congressional inaction—the "quicksand" [*Helvering v. Hallock*, 309 U.S. 106, 121 (1940)] on which the Court has stanchioned the exemption of baseball's reserve system, could not provide a firmer foundation for the *refutation* of Organized Baseball's contention that its *entire business* is exempt.

Implicitly recognizing the absence of any justification for the exemption of the entire business of baseball, Respondent alternatively attempts to characterize his disapproval of Petitioner's assignments, which fully complied with the Major League Rules, as an historically essential sports practice which developed prior to *Toolson* in reliance on *Federal Baseball*. (Opposition, pp. 12-13). This argument fails on three counts. First, the disapproval of the assignments constituted only one part of a conspiracy designed to fix the price of player talent and to drive Petitioner out of baseball, which conspiracy obviously is not an historically essential sports practice. Second, the evidence conclusively established that the disapproval of an assignment complying with the rules was not an historically essential sports practice. Prior to the case at bar no undisputed assignment which fully complied with the Major League Rules had ever been disapproved. [R.T. 455; 585.] All of Commissioner Landis' assignment disapprovals, on which Respondent relies, involved disputes between clubs or rules violations, and Respondent's requested findings that these disapproved assignments *complied* with the rules were *rejected* by the District Court. [Resp.'s Prop. Findings 42, 44, 45, 46, 48; Findings of Fact, Conclusions of Law, March 17, 1977 Judgment Order.] The complete lack of evidence to support

this premise is revealed by Commissioner Kuhn's admission before Congress in 1972, twenty years *after Toolson*, that "The Commissioner is not given a right of consent on a contract transfer." [R.T. 570-1.]

Third, Petitioner's antitrust cause of action alleged that the historical practice regarding assignments has been that the Commissioner ministerially approves all assignments which comply with the Major League Rules. [Complaint, par. 32.] On the dismissal of a complaint by the District Court, such an allegation must be taken as true. *United States v. International Boxing Club*, 348 U.S. 236, 240 (1955). This fundamental rule also disposes of Respondent's last contention. This *non sequitur* suggests that because Petitioner failed to prove the allegations of its *antitrust* action by the evidence it tendered in support of the theory that Respondent's decision was *arbitrary*, the dismissal of the antitrust action need not be reversed. (Opposition, pp. 13-14.) Aside from the complete dissimilarity between the two actions and the Respondent's objection to and foreclosure of discovery supporting Petitioner's antitrust action once it was dismissed, these allegations must be taken as true regardless of any asserted failure of proof on other issues. *Id.*

In conclusion, Petitioner submits that only baseball's reserve system is exempt from the antitrust laws, that Petitioner's antitrust action does not challenge that system, and that the judgment dismissing the action was therefore in error.

III

Baseball's Blanket Waiver of Recourse to the Courts Violates Federal and State Public Policy.

Respondent urges that the validity of a contractual waiver of the diversity and federal question jurisdiction of the *federal* courts is dependent upon *state* common law—in this instance that of Illinois—and therefore no federal question is presented by this petition. (Opposition, pp. 19-20.) If this proposition were true, the states could have long ago effectively deprived the federal courts of their jurisdiction. However, this Court rejected this very argument in *Home Ins. Co. v. Morse,* 87 U.S. 445, 450 (1874), in which a contractual clause waiving a party's federal statutory right of removal was held in violation of *federal* public policy despite state law providing for and upholding the validity of the clause. This aspect of *Home Ins. Co. v. Morse* was reaffirmed by this Court in *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 9 at fn. 10 (1972).

In Title 28 U.S.C. §§ 1331 and 1332 Congress declared that the federal courts shall have jurisdiction of "all civil actions" where a federal question is presented or diversity of citizenship lies. This Court has held that "a party cannot stipulate away such a jurisdiction which the legislature (Congress) declares open." *The Anaconda v. American Sugar Ref. Co.,* 322 U.S. 42, 46 (1943). (Parentheses added.) Thus, Organized Baseball's waiver of recourse to the courts, whereby the parties to the Major League Agreement purport

to stipulate away the diversity and federal question jurisdiction which Congress declared open, is invalid as a matter of *federal* law. The *Home Insurance* and *Anaconda* cases are only two of the long established and still firmly-intact line which holds that a blanket waiver of recourse to the courts constitutes an unmitigated attempt to oust the federal courts of their jurisdiction and thereby violates *federal* public policy. *Guaranty Trust & Safe Deposit Co. v. Greencove R.R.,* 139 U.S. 137, 143 (1891); *McCulloch v. Clinch-Mitchell Const. Co.,* 71 F. 2d 17, 21 (8th Cir. 1934); *Beuttas v. United States,* 60 F. Supp. 771, 780 (Ct. Cl. 1944).

Despite these precedents, Respondent further contends that the District and Appellate Courts were correct in concluding that this Court's decisions in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974); *D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174 (1972); and *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972), would uphold Baseball's blanket waiver of recourse to the courts (Opposition, pp. 21-24; Opinion by Judge Sprecher, pp. 32-33; Opinion by Judge McGarr, p. 80.) This contention is without merit. As demonstrated in the Petition (p. 31), these three cases lend no support for the holding that baseball's unlimited and unknowing waiver of all future recourse to the courts is valid. Conversely, none of the numerous federal cases invalidating a blanket waiver of recourse to the courts has been disapproved. Since Baseball's blanket waiver was accepted by Petitioner on a "take

it or leave it basis," since it authorizes the Commissioner to instigate and then finally decide a dispute to which he is a party, since it exculpates him from even his wilful and fraudulent acts, and since it stipulates away federal jurisdiction declared open by Congress, the waiver clause clearly violates *federal* and state public policy.

Respondent's proposition that this Court should defer review of the instant judgment upholding Baseball's blanket waiver and "await a case" in which "a party (has been) deprived of its opportunity to litigate its claims in Court," (Opposition, p. 21) is nonsensical. There is simply no reason to await such a case and several compelling grounds for immediate review. The instant judgment declaring the clause valid and enforceable is final, appealable and, according to *Respondent's* Motion for Summary Judgment, "presents one straightforward legal issue: whether a private contract to forego litigation . . . is enforceable in the courts." [Memorandum in Support of Summary Judgment, p. 2.] If this Court does defer review, other monopolistic private associations undoubtedly will adopt similar clauses in reliance on the precedent. Meanwhile, between now and the time Respondent's hypothetical case arises, countless members of Organized Baseball and any other private associations adopting such a waiver will forego meritorious litigation due to the chilling effect of the clause and the precedent upholding it. Petitioner submits that this high societal price is totally unnecessary.

Thus, Petitioner submits that Baseball's blanket waiver clearly violates federal public policy and respectfully urges this Court to review and reverse the judgment upholding it.

IV

The District Court's Refusal to Receive or Consider Evidence of Respondent's Malice Toward Petitioner Denied Petitioner's Due Process Right to Present Evidence.

Respondent's contention that the District Court did not refuse to receive or consider evidence of the Commissioner's malice toward Petitioner and simply placed a reasonable limitation on the scope of cross-examination is conclusively rebutted by the record,[2] which shows that on four occasions the Court ruled that it would not receive or consider evidence of the Commissioner's "motivation at the time, or his . . . lack of regard of Mr. Finley" because it "does not seem

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[2]MR. BLEAKLEY: . . . Mr. Finley has accused the Commissioner of Baseball, the defendant in this case, of acting out of malice and ill will toward him personally and persists in that allegation. I think in connection with that allegation we are entitled to show that on occasions in the past Mr. Finley has been somewhat difficult.

THE COURT: I don't think that is permissible because *I don't think that the motivation of the Commissioner is going to be very relevant.* It is whether he had the authority or whether he didn't.

MR. BLEAKLEY: Well, *if your Honor is ruling that motivation of the Commissioner is not relevant* I will be more than happy to drop that line of questioning but *it is an allegation in the plaintiff's complaint.*

THE COURT: Well, it is one that the testimony thus far has not really supported and *I don't think it is a serious allegation. I don't take it seriously. I am not interested in whether the Commissioner likes Mr. Finley or whether he doesn't. If he had the authority to do what he did, we have a legal issue, and that is the only one I am going to look at,* so I will sustain the objection.

* * * *

MR. BLEAKLEY: I have to belabor this—

THE COURT: I won't put you in the box, *I don't think that whether the Commissioner and Mr. Finley had any sort of a feud going or any personal animosity is relevant to the*

(This footnote is continued on next page)

relevant to me." [R.T. 2003.] In the words of *Respondent's* counsel during trial, "your Honor said that you didn't take the allegation of malice seriously and you did not want to hear evidence on it." [R.T. 2003.] This record demonstrates that the District Court did refuse to consider any evidence of malice and thereby refutes Respondent's further contention that the rulings were inconsequential in this case.

Respondent finally submits that certiorari should be denied because the malice issue has no significance in any other litigation. To the contrary, the issue could have no broader significance. This Court's mandate that "The refusal of a court to receive or consider any proof whatever on (a material issue) amounts

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issues in this case, and that will be my attitude when Mr. Kuhn is on the stand as well.

* * * *

MR. BLEAKLEY: Well, your Honor, when I was cross-examining Mr. Finley and I began to ask questions in the area of malice, *your Honor said that you didn't take the allegation of malice seriously and you did not want to hear evidence on it.*"

THE COURT: *I do recall that.*

MR. BLEAKLEY: And I therefore dropped a very extensive line of questioning on cross-examination of Mr. Finley.

THE COURT: Is that why you're going into it now, is that its relevance?

MR. PAPIANO: That is its relevance.

THE COURT: Right along, I have to be consistent, counsel, so I'll sustain the objection.

MR. PAPIANO: Your Honor, you are, I'm sure that the Court is cognizant of the fact that *that is one of the allegations of the complaint* and that there is—*we are making an offer of proof on that allegation.*

THE COURT: I understand, that's correct.

Just so that we can be clear on this, my judgment in the matter would be that since the issue in the trial is the Commissioner's power to do what he did plus the other legal issues that I've adverted to, *his motivation at the time, or his regard or lack of regard of Mr. Finley does not seem relevant to me and the context of the case as I hear it.* So, that's the reason for the ruling. [R.T. 810-12, 2003.] (Emphasis added.)

to a denial of a hearing on that issue, in contravention of the due process clause of the Constitution," [(*Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 171 (1935) (parentheses added)] applies to *every single state* and *federal* case in the Union. Unless this Court is ready and willing to reiterate and enforce that mandate in those cases, such as the instant matter, in which the lower courts have violated it, this vital Constitutional protection will be lost.

Conclusion.

For these reasons Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1978.
